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No. 90-1031

Supreme Court, U.S.

FILED

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1990

\_\_\_\_\_  
JACK HALLER,

Petitioner,

-v-

DONALD BORROR, ET AL.,

Respondents.

\_\_\_\_\_  
PETITIONER'S REPLY TO BRIEF IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

\_\_\_\_\_  
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1890

The following table shows the number of persons who have been admitted to the various institutions of the State during the year ending June 30, 1890.

Asylum for the Insane, 1,234; Asylum for the Deaf and Dumb, 1,000; Asylum for the Blind, 1,000; Asylum for the Feeble-minded, 1,000.

The total number of persons admitted to the various institutions of the State during the year ending June 30, 1890, was 4,234.

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I. THE OHIO STATUTE OF LIMITATIONS FOR "BODILY INJURY" DOES NOT GOVERN ALL PERSONAL INJURIES AND THEREFORE DOES NOT APPLY TO 42 U.S.C. §§1983 AND 1985 ACTIONS

Respondents argue that the two-year statute of limitations governing actions for "bodily injury" (Ohio Revised Code §2305.10) should be applied to 42 U.S.C. §§1983 and 1985 cases.

Respondents' argument and the decision of the Sixth Circuit Court of Appeals are contrary to the express language of Owens v. Okure, \_\_\_ U.S. \_\_\_, 109 S.Ct. 573 (1989) and to decisions by circuit courts interpreting Owens. This case is significant because the court below ignored this Court's direction in Owens.

Respondents have argued that the two year "bodily injury" statute of limitations is reasonable for federal civil rights actions because federal courts in other states have upheld one or two year statutes of limitations for civil rights actions. (See Brief of Respondent Borrer, at 8.) The question to be answered, however, is not whether a one, two, or four year statute of limitations is reasonable





for civil rights cases. The question is which statute of limitations is the general or residual statute of limitations for all personal injury cases in a particular state.

Respondents ignore the fact that this Court stated in Owens, supra, that the statute of limitations for federal civil rights actions must be broad enough to cover the full panoply of rights and remedies covered by the civil rights statutes--from the denial of First Amendment rights, to the deprivation of medical facilities in prisons, to the denial of equal employment opportunities. See, Owens, supra, 109 S.Ct. at 581. Not all violations of federal civil rights statutes involve bodily injury. Indeed, many violations of civil rights laws involve mental and emotional distress or a loss of earnings. A statute of limitations governing only bodily injury can not, under the doctrine enunciated in Owens, be the general personal injury statute applicable to all civil rights actions.



Respondents have argued that the Ohio statute of limitations governing "injury to the rights of the plaintiff" not enumerated in other sections could not be the general personal injury statute of limitations because that statute does not say that it is the "personal injury" statute of limitations. (Brief of respondent Borrer, at 12-14.) Respondents ignore the unequivocal language of Owens as to what constitutes a general personal injury statute of limitations.

This Court stated in Owens that there are two different types of statutes of limitations "governing personal injury actions": "a general provision which applies to all personal injury actions with certain specific exceptions" and "a residual provision which applies to all actions not specifically provided for, including personal injury actions." Owens, supra, 109 S.Ct. at 580 (emphasis added).

Ohio does not have a "general provision which applies to all personal injury actions."



[Emphasis added.] The statute of limitations which, according to respondents, is the general personal injury statute of limitations does not apply to all personal injuries; it applies to only bodily injuries. Therefore, the general statute of limitations applicable to personal injury actions in Ohio must be the second type of statute articulated in Owens: "a residual provision which applies to all actions not specifically provided for...." Ohio Revised Code §2305.09(D) is such a statute; it applies to actions for "injury to the rights of the plaintiffs (including personal injuries)" not enumerated in other sections.

Ohio courts have applied O.R.C. §2305.09(D) to personal injuries not involving physical or bodily injuries. Thus, O.R.C. §2305.09(D) governs such personal injuries as intentional infliction of emotional distress, Yeager v. Local Union 20, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), and invasion of privacy, Morgan v. Hustler Magazine, 653 F.Supp. 711 (N.D. Ohio



1987). Respondents make the preposterous argument that the torts of intentional infliction of emotional distress and invasion of privacy do not involve personal injuries, because the Ohio courts which created them did not use the word "personal injury" in describing them. There is no reason why the Ohio courts would put a label on non-physical torts. It cannot be seriously debated that intentional infliction of emotional distress and invasion of the right to privacy are not injuries to the person.

Respondents also state that in 1928 the Ohio Supreme Court defined "personal injury" as "'an injury either to the physical body of a person or to the reputation of a person, or to both.'" [Brief of Respondent Borrer, at 15 and municipal respondents, at 9, quoting Smith v. Buck, 119 Ohio St. 101 (1928).] Respondents continue that such torts as intentional infliction of emotional distress and invasion of privacy are not "personal injuries" because they





are not injuries to the physical body or result in a loss to reputation.

What respondents fail to mention, however, is that torts such as intentional infliction of emotional distress and invasion of privacy did not exist in 1928, and therefore the Ohio Supreme Court could not have included them in its definition of personal injuries. The Ohio Supreme Court was saying that there are two components to personal injuries: the physical and the non-physical. Libel and slander were the primary non-physical (or dignitary) torts in 1928.

Petitioner is aware of the fact that in determining the applicable statute of limitations for actions brought under 42 U.S.C. §1983 one does not apply the statute of limitations that governs some but not all of the claims that are analogous to federal civil rights claims. Petitioner points out that Ohio courts have applied the general four year statute of limitations for claims such as

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invasion of the right to privacy and intentional infliction of emotional distress in order to show that Ohio courts have held the "bodily injury" statute of limitations not applicable to all personal injuries. Since the bodily injury statute (O.R.C. §2305.11) does not apply to all personal injuries, this Court's holding in Owens, supra, requires that the general catch-all statute governing "injury to the rights of the plaintiff" be applied to federal civil rights actions.

Respondents are, of course, correct in asserting that the Sixth Circuit Court of Appeals is the only federal appellate court that has determined which state statute of limitations in Ohio governs civil rights claims. The decisions of other federal appellate courts, however, are instructive, because all of these courts have held that statutes of limitations governing personal injuries or injuries to the rights of persons are applicable to federal civil rights actions. None of these appellate



courts, with the possible exception of the Seventh Circuit Court of Appeals, have held that a statute applicable to only "bodily injury" governed civil rights actions.

The Seventh Circuit Court of Appeals issued two decisions interpreting Owens, supra, which appear to conflict with one another. One panel of the Seventh Circuit held that an Illinois statute of limitations applicable to "personal injuries" and interpreted by Illinois courts to be limited to "bodily injuries" was the most analogous statute of limitations for federal civil rights actions. See, Kalimara v. Illinois Department of Corrections, 879 F.2d 276, 277 (7th Cir. 1989), and Berghoff v. R.J. Frisby Manufacturing Co., 720 F.Supp. 649, 652 (N.D.Ill. 1989).<sup>1</sup>

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<sup>1</sup>The Seventh Circuit Court of Appeals did not engage in any analysis of how Illinois state courts interpreted the phrase "injury to the person." Kalimara v. Illinois Department of Corrections, supra. The court merely stated that a statute governing actions involving "injury to the person" was the residual personal injury statute of limitations in Illinois.

(continued...)



Another panel of the Seventh Circuit Court of Appeals held that a Wisconsin statute similarly worded to the Illinois statute did not govern civil rights actions. Instead, a Seventh Circuit Court panel held that the statute applicable to "injury to the rights of another" should be applied to civil rights actions. The Court of Appeals held that the broad catch-all statute of limitations provided "a remedy for a 'wide spectrum of claims' that include more than bodily injury." Gray v. Lacke, 885 F. 2d 399, 408 (7th Cir. 1989), cert denied, \_\_\_ U.S. \_\_\_,

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<sup>1</sup>(...continued)

A federal district court conducted an extensive analysis of interpretations by Illinois courts of "injury to the person". Berghoff v. R.J. Frisby Manufacturing Co., 720 F.Supp. at 652-654. The Berghoff Court concluded that Illinois courts have held that "injury to the person" applied only "to direct physical injuries". The district court held that the statute governing "injuries to the person" did not apply to a case alleging a retaliatory discharge, because the retaliatory discharge did not involve physical injuries. Instead, the court applied the five year catch-all statute of limitations that applied to "all civil actions not otherwise provided for." Berghoff v. R.J. Frisby Manufacturing Co., 720 F.Supp. at 651, 654.





110 S.Ct. 1476 (1990) [emphasis added].

Thus, the decision of one panel of the Seventh Circuit Court of Appeals is consistent with holdings of the Sixth Circuit Court of Appeals, whereas the decision of another panel (see, Lacke, supra) is in direct conflict with the Sixth Circuit's interpretation of Owens, supra.

## II. CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Certiorari, this Court should summarily reverse this case and remand it for reconsideration in light of Owens v. Okure, supra, or in the alternative, set this case down for oral argument to ensure conformity with this Court's decisions and to resolve conflicts among the circuit courts of appeals.



Respectfully submitted,

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